

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DANIEL GARCIA ORNELAS,

Petitioner,

v.

WARDEN D. ADAMS,

Respondent.

No. C 09-0344 MMC (PR)

ORDER TO SHOW CAUSE

On January 26, 2009, petitioner, a California prisoner proceeding pro se, filed the above-titled petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner has paid the filing fee.

BACKGROUND

In 2006, in the Superior Court of Santa Clara County, petitioner was convicted of three counts of lewd and lascivious conduct on a child under fourteen, and a prior serious felony conviction was found true. He was sentenced to a term of twenty-five years in state prison and ordered to pay \$470.00 in penalty assessments. The California Court of Appeal modified the amount of the penalty assessments, but otherwise affirmed the judgment of conviction. The California Supreme Court denied review. Petitioner did not seek state habeas corpus relief.

DISCUSSION

A. Standard of Review

This Court may entertain a petition for a writ of habeas corpus “in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a);

1 Rose v. Hodges, 423 U.S. 19, 21 (1975). A district court shall “award the writ or issue an
2 order directing the respondent to show cause why the writ should not be granted, unless it
3 appears from the application that the applicant or person detained is not entitled thereto.”
4 28 U.S.C. § 2243. Summary dismissal is appropriate only where the allegations in the
5 petition are vague or conclusory, palpably incredible, or patently frivolous or false. See
6 Hendricks v. Vasquez, 908 F.2d 490, 491 (9th Cir. 1990) (quoting Blackledge v. Allison,
7 431 U.S. 63, 75-76 (1977)).

8 B. Petitioner’s Claims

9 Petitioner raises the following claims for relief: the trial court erroneously admitted
10 evidence of petitioner’s prior offenses and a probation report pertaining to one of those
11 offenses, in violation of the Fifth and Fourteenth Amendments; petitioner was denied his
12 Sixth Amendment right to effective assistance of counsel when his trial attorney failed to
13 impeach a prosecution witness and to object to the court’s erroneous evidentiary rulings;
14 petitioner was denied due process when the trial court erroneously instructed the jury
15 regarding the evidence of other crimes and the prosecution’s burden of proof. Liberally
16 construed, petitioner’s claims are cognizable.

17 **CONCLUSION**

18 For the reasons stated above, the Court orders as follows:

19 1. The Clerk shall serve by certified mail a copy of this order, the petition and all
20 attachments thereto on respondent and respondent’s counsel, the Attorney General for the
21 State of California. The Clerk shall also serve a copy of this order on petitioner.

22 2. Respondent shall file with the Court and serve on petitioner, within **ninety (90)**
23 days of the date this order is filed, an answer conforming in all respects to Rule 5 of the
24 Rules Governing Section 2254 Cases, showing cause why a writ of habeas corpus should not
25 be granted based on petitioner’s cognizable claims. Respondent shall file with the answer
26 and serve on petitioner a copy of all portions of the state trial record that have been
27 transcribed previously and that are relevant to a determination of the issues presented by the
28 petition.

1 If petitioner wishes to respond to the answer, he shall do so by filing a traverse with
2 the Court and serving it on respondent's counsel within **thirty (30)** days of the date the
3 answer is filed.

4 3. In lieu of an answer, respondent may file, within **ninety (90)** days of the date this
5 order is filed, a motion to dismiss on procedural grounds, as set forth in the Advisory
6 Committee Notes to Rule 4 of the Rules Governing Section 2254 Cases. If respondent files
7 such a motion, petitioner shall file with the Court and serve on respondent an opposition or
8 statement of non-opposition within **thirty (30)** days of the date the motion is filed, and
9 respondent shall file with the Court and serve on petitioner a reply within **fifteen (15)** days of
10 the date any opposition is filed.


11 4. Petitioner is reminded that all communications with the Court must be served on
12 respondent by mailing a true copy of the document to respondent's counsel.

13 5. It is petitioner's responsibility to prosecute this case. Petitioner must keep the
14 Court and respondent informed of any change of address and must comply with the Court's
15 orders in a timely fashion. Failure to do so may result in the dismissal of this action for
16 failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b).

17 6. Upon a showing of good cause, requests for a reasonable extension of time will be
18 granted provided they are filed on or before the deadline they seek to extend.

19 IT IS SO ORDERED.

20 DATED: August 12, 2009

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MAXINE M. CHESNEY
22 United States District Judge
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